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Bina Puri Sdn Bhd v TKL Oil & Gas Sdn Bhd

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS WA-24C-84–05 OF 2019 AND WA-24C-98–06 OF 2019
LEE SWEE SENG J
8 NOVEMBER 2019

C *Building and Construction Law — Construction contracts — Adjudication of payment disputes — Application to enforce adjudication decision — Whether High Court could assess afresh decision of adjudicator on issue of jurisdiction — Whether adjudicator had exceeded jurisdiction in that subcontract was joint venture contract and not construction contract — Whether adjudication ought to* D *be set aside as adjudicator failed to appreciate breaches and delay on part of claimant — Construction Industry Payment and Adjudication Act 2012, s 28*

E TKL Oil and Gas Sdn Bhd ('TKL') as the claimant had commenced adjudication against Bina Puri Sdn Bhd ('Bina Puri') as the respondent under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). TKL obtained an adjudication decision in its favour. The claimant would proceed to enforce the adjudication decision under s 28 of the CIPAA under Originating Summons No WA-24C-98–06 of 2019. Correspondingly, the respondent who had an adjudication decision against it applied to set aside the F adjudication decision under s 15 of the CIPAA under Originating Summon No WA-24C-84–05 of 2019. By way of letter of award and a subcontract agreement ('subcontract'), Bina Puri appointed TKL as its subcontractor for a project known as 'utilities, interconnecting, offsite (UIO) facilities: Engineering, Procument, Construction and Commissioning (EPCC) of main G control building and laboratory building at Pengerang, Johor ('the project'). TKL was awarded the mechanical and electrical works for the project. The employer in the project as PRPC Utilities and Facilities Sdn Bhd ('PRPC') and Bina Puri had been appointed by the employer as the main contract between PRPC and Bina Puri ('the main contract'). TKL contended that in breach of H the subcontract, Bina Puri had failed to pay TKL for construction works that had been performed by TKL pursuant to the subcontract. TKL commenced adjudication against Bina Puri under CIPAA and the adjudicator had delivered the adjudication decision in favour of TKL. The issues needed to be determined were: (a) whether High Court could assess afresh the decision of I the adjudicator on the issue of jurisdiction; (b) whether the adjudicator had exceeded his jurisdiction in that the subcontract is a joint venture contract and not a construction contract; and (c) whether the adjudication ought to be set aside as the adjudicator failed to appreciate the breaches and delay on part of the claimant.

Held, allowing the application with costs of RM6,000 for each of originating summons:

(1) The court was not bound by the finding of fact of the adjudicator but instead the court was at liberty to consider the evidence with respect to jurisdiction afresh and anew to determine if the adjudicator appointed had jurisdiction. If an adjudicator did not have jurisdiction then should the adjudicator found that he did have, then the court was duty bound to set aside the adjudication decision delivered as emanating from an adjudicator that had no jurisdiction to adjudicate the dispute, s 15(d) allowed the High Court to set aside an adjudication decision on the ground that the adjudicator exceeded his jurisdiction. The court might proceed to hear the application to set aside the adjudication decision on the ground of the complete lack of jurisdiction to hear the dispute and deliver the adjudication under its inherent power (see paras 18–19 & 23–25).

(2) The reasons given by the adjudicator were both cogent and compelling and the court was constrained to uphold such a finding on jurisdiction, as convinced independently that indeed the contract in question was a construction contract and not a joint venture contract. It was a typical subcontract quite common in the construction industry in Malaysia with all the work at the ground level done by the subcontractor and the main contractor would take a margin and passed he contractually agreed subcontract sum to the subcontractor and with that the risk as well. The court found that the adjudicator clearly had jurisdiction to adjudicate the claim and deliver the decision, the contract in question was a construction contract within the meaning of s 4 of the CIPAA to which s 2 of the CIPAA applied. There was no element of joint venture that would transform or caused the construction contract to evolve into a joint venture contract that took it outside the applicability of the CIPAA (see paras 38–39 & 57–58).

(3) It was not proper nor within the purview of the court to review the decision made on the ground of wrong factual findings or insufficient appreciation of certain evidence adduced. It after all was not an appeal. The allegation of delay on the part of TKL and its purported step in rights under the subcontract agreement had been taken into account and considered by the adjudicator. It was a case where Bina Puri was estopped from contending on the merits of the adjudication proceedings which has already been dealt with in the adjudication proceedings (see paras 60–62).

[Bahasa Malaysia summary

TKL Oil and Gas Sdn Bhd ('TKL') sebagai penuntut telah memulakan adjudikasi terhadap Bina Puri Sdn Bhd ('Bina Puri') sebagai responden di

bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta'). TKL telah memperoleh keputusan adjudikasi yang memihak kepada mereka. Penuntut kemudiannya meneruskan untuk menguatkuasakan keputusan adjudikasi di bawah s 28 Akta melalui Saman Pemula No WA-24C-98–06 Tahun 2019. Sewajarnya, responden yang mempunyai keputusan adjudikasi terhadap mereka telah memohon untuk mengetepikan keputusan adjudikasi di bawah s 15 Akta melalui Saman Pemula No WA-24C-84–05 of 2019. Melalui surat awad dan perjanjian subkontrak ('subkontrak'), Bina Puri melantik TKL sebagai subkontraktornya untuk projek yang dikenali sebagai 'utiliti, perhubungan, kemudahan di luar lokasi (UIO): Kejuruteraan, Perolehan, Pembinaan dan Pentauliahan (EPCC) bangunan kawalan utama dan bangunan makmal di Pengerang, Johor ('projek tersebut'). TKL dianugerahkan kerja mekanikal dan elektrikal untuk projek tersebut. Majikan dalam projek tersebut sebagai PRPC Utilities and Facilities Sdn Bhd ('PRPC') dan Bina Puri telah dilantik oleh majikan sebagai kontrak utama antara PRPC dan Bina Puri ('kontrak utama tersebut'). TKL berpendapat bahawa melanggar subkontrak, Bina Puri gagal membayar TKL untuk kerja-kerja pembinaan yang telah dilakukan oleh TKL berdasarkan subkontrak tersebut. TKL memulakan adjudikasi terhadap Bina Puri di bawah Akta dan adjudikator telah memberikan keputusan adjudikasi yang memihak kepada TKL. Isu-isu yang perlu ditentukan adalah: (a) sama ada Mahkamah Tinggi dapat menilai kembali keputusan adjudikator mengenai isu bidang kuasa; (b) sama ada adjudikator telah melampaui bidang kuasanya kerana subkontrak itu adalah kontrak usaha sama dan bukan kontrak pembinaan; dan (b) sama ada adjudikasi tersebut harus diketepikan kerana adjudicator telah gagal dalam menilai pelanggaran dan kelewatan oleh penuntut.

Diputuskan, membenarkan permohonan dengan kos RM6,000 bagi setiap saman pemula:

(1) Mahkamah tidak terikat dengan dapatan fakta oleh adjudikator tetapi sebaliknya mahkamah bebas untuk mempertimbangkan bukti berkenaan dengan bidang kuasa mutakhir dan baru dalam menentukan sama ada adjudikator yang dilantik mempunyai bidang kuasa. Sekiranya adjudikator tidak mempunyai bidang kuasa kemudian sekiranya adjudikator mendapati bahawa beliau memang memilikinya, maka mahkamah terikat untuk mengetepikan keputusan adjudikator yang diberikan kerana berasal dari adjudikator yang tidak mempunyai bidang kuasa untuk memutuskan pertikaian tersebut, s 15(d) membenarkan Mahkamah Tinggi untuk mengetepikan keputusan adjudikator dengan alasan bahawa adjudikator melampaui bidang kuasanya. Mahkamah mungkin akan terus mendengar permohonan untuk mengetepikan keputusan adjudikator dengan alasan kurangnya bidang kuasa untuk mendengar pertikaian dan memberikan keputusan berdasarkan kuasa yang ada (lihat perenggan 18–19 & 23–25).

(2) Alasan yang diberikan oleh adjudicator adalah tepat dan meyakinkan dan mahkamah terpaksa menegaskan dapatan mengenai bidang kuasa, seperti yang diyakinkan secara bebas bahawa memang kontrak yang dimaksudkan adalah kontrak pembinaan dan bukan kontrak usaha sama. Ini adalah subkontrak tipikal yang biasa berlaku dalam industri pembinaan di Malaysia dengan semua kerja di peringkat dasar dijalankan oleh subkontraktor dan kontraktor utama akan mengambil margin dan memberikan secara persetujuan kontraktual jumlah subkontrak kepada subkontraktor dan dengan risiko sama sekali. Mahkamah mendapati bahawa adjudikator jelas mempunyai bidang kuasa untuk mengadili tuntutan dan memberikan keputusan, kontrak yang dimaksud adalah kontrak pembinaan dalam erti s 4 Akta yang mana s 2 Akta adalah terpakai. Tidak ada unsur usaha sama yang akan mengubah atau menyebabkan kontrak pembinaan berkembang menjadi kontrak usaha sama yang membawanya di luar pemakaian Akta (lihat perenggan 38–39 & 57–58).

(3) Ianya adalah tidak wajar atau diluar lingkup mahkamah untuk mengkaji keputusan yang dibuat atas dasar dapatan fakta yang salah atau apresiasi sesetengah bukti yang dikemukakan tidak mencukupi. Lagipun ianya bukanlah rayuan. Dakwaan kelewatan pihak TKL dan haknya di bawah perjanjian subkontrak telah dipertimbangkan dan diputuskan oleh adjudikator. Ini adalah kes di mana Bina Puri diestop untuk tidak bersaing atas merit prosiding adjudikasi yang telah diputuskan dalam prosiding adjudikasi (lihat perenggan 60–62).]

Cases referred to

Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd [2015] MLJU 941; [2015] 8 CLJ 728, HC (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor [1995] MLJU 306; [1995] 3 CLJ 520, CA (refd)

Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case [2017] MLJU 242, HC (refd)

View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22, FC (refd)

YTK Engineering Services Sdn Bhd v Towards Green Sdn Bhd and other applications [2017] MLJU 632; [2017] 1 LNS 601, HC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 2, 4, 5(2)(d), 15, 15(d), 27(3), 28

Rules of Court 2012 O 92 r 4

Foo Joon Liang (Tan Min Lee and Kaylee Tan Jin Yee with him) (Gan Partnership) in Originating Summons WA-24C-84–05 of 2019 for the plaintiff.

Joshua Chong (Magdalene Soon with him) (Raja, Darryl & Loh) in Originating

Summons WA-24C-98–06 of 2019 for the plaintiff.
Foo Joon Liang (Tan Min Lee and Kaylee Tan Jin Yee with him) (Gan Partnership) in Originating Summons WA-24C-98–06 of 2019 for the defendant.
Joshua Chong (Magdalene Soon with him) (Raja, Darryl & Loh) in Originating Summons WA-24C-84–05 of 2019 for the defendant.

Lee Swee Seng J:

[1] TKL Oil and Gas Sdn Bhd ('TKL') as the claimant had commenced adjudication against Bina Puri Sdn Bhd ('Bina Puri') as the respondent under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). TKL obtained an adjudication decision in its favour.

[2] Almost predictably as with a lot of adjudication decision in the absence of a settlement, the claimant armed with an adjudication decision in its favour would proceed to enforce it under s 28 of the CIPAA. Correspondingly the respondent who has an adjudication decision against it would apply to set aside the Adjudication decision under s 15 of the CIPAA.

PROCEEDINGS BEFORE THIS COURT

[3] Originating Summons No WA-24C-84–05 of 2019 is an application by Bina Puri to, inter alia, set aside the adjudication decision ('setting aside application') and for a stay of execution of the adjudication decision ('stay application') pending the disposal of the setting aside application.

[4] Originating Summons No WA-24C-98–06 of 2019 is an application by TKL for an order to enforce the adjudication decision as if it is a judgment or order of the High Court ('enforcement application').

[5] This court had earlier heard the stay application and determined it in favour of Bina Puri on 3 June 2019.

PROJECT

[6] By way of a letter of award dated 9 October 2015 ('letter of award') and a subcontract agreement dated 20 November 2015 ('subcontract agreement') ('collectively referred to as subcontract'), Bina Puri appointed TKL as its subcontractor for a project known as 'Utilities, Interconnecting, Offsite (UIO) Facilities: Engineering, Procurement, Construction and Commissioning (EPCC) of Main Control Building and Laboratory Buildings (Package 14-1701) at Pengerang, Johor' ('project'). TKL was awarded the mechanical and electrical (M&E) works for the project.

[7] The employer in the project was PRPC Utilities and Facilities Sdn Bhd ('PRPC') and Bina Puri had been appointed by the employer as the main contractor by way of a main contract between PRPC and Bina Puri ('main contract'). **A**

[8] TKL contended that in breach of the subcontract, Bina Puri had failed to pay TKL for construction works that had been performed by TKL pursuant to the subcontract. **B**

[9] TKL commenced adjudication against Bina Puri under the CIPAA and the adjudicator had on 3 May 2019 delivered the adjudication decision in favour of TKL. **C**

[10] Under the adjudication decision, the adjudicator decided that Bina Puri was liable to pay TKL as follows: **D**

Adjudication Decision

For all the reasons above, I, accordingly, DECIDE as follows:

(1) The Respondent shall pay the Claimant the principal sum of *RM709,661.22* (Ringgit Malaysia Seven Hundred and Nine Thousand Six Hundred and Sixty One and Twenty Two sen only); **E**

(2) The Respondent shall pay the Claimant the sum of *RM50,000.00* (Ringgit Malaysia Fifty Thousand only) for party to party costs;

(3) The Respondent shall pay the Claimant the sum of *RM114,255.28* (Ringgit Malaysia One Hundred and Fourteen Thousand Two Hundred and Fifty Five and Twenty Eight sen only) for the adjudicator's fees and expenses and the Claimant's incurred KLRCA's fees; **F**

(4) All the sums mentioned in (1), (2) and (3) above shall be paid by the Respondent to the Claimant within 14 days from the date of this decision in the form of a secured financial instrument; **G**

(5) The Claimant is entitled to a further simple interest at 5% per annum for any of the Adjudicated Amounts stated above in (1), (2) and (3) that remains unpaid after 14 days from the date of this decision until date of actual payment. **H**

See: Adjudication decision at exh 'P11' of the enforcement affidavit in support.

PRINCIPLES

Whether the High Court can assess afresh the decision of the adjudicator on the issue of jurisdiction **I**

[11] Bina Puri's setting aside application was premised on the ground that the adjudicator had acted in excess of his jurisdiction under s 15(d) of the

CIPAA. Bina Puri argued that the subcontract is a joint venture contract and not a 'construction contract' and as such the adjudicator had no jurisdiction to adjudicate the dispute.

[12] Section 2 of the CIPAA clearly provides as follows with respect to the applicability of the CIPAA as follows:

> 2 Application
>
> This Act applies to *every construction contract* made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government.

[13] Section 4 of the CIPAA in turn defined a 'construction contract' to mean a construction work contract or construction consultancy contract.

[14] 'Construction work' is defined to mean 'the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of:

> (a) Any *building*, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level; ...
>
> .....
>
> (d) Any *electrical, mechanical,* water, gas, oil, petrochemical or telecommunication *work*; ... (Emphasis added.)

[15] Bina Puri argued that whilst the subcontract in question may have the characteristics of a 'construction contract' it is nevertheless and more importantly, at the core of it, a joint venture contract with respect to construction work. The CIPAA was not designed for adjudicating disputes arising from a 'joint venture contract' even if the base of the contract is that of 'construction work' and hence ostensibly a 'construction contract.' It was further argued that the adjudicator should have inquired into the true nature of the contract and had he done so, he would have come to the conclusion that it is a 'joint venture contract' and not a 'construction contract'.

[16] As the CIPAA applies only to 'construction contract' and not to 'joint-venture contract' that may even have as its base a construction element or 'construction work', one is dealing with the issue of 'core jurisdiction' as opposed to 'contingent jurisdiction' or 'competence jurisdiction'.

[17] The High Court in *Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case* [2017] MLJU 242 explained 'core jurisdiction' as follows:

[71] There are many senses in which the word 'jurisdiction' may be understood. We need only to differentiate between core jurisdiction, competence jurisdiction and contingent jurisdiction.

[72] *Core jurisdiction would be the question of whether the subject matter of the dispute is one which the Act has conferred on the sdjudicator.* Thus if a contract is not a construction contract, but a shipping or mining contract or a contract for legal fees with respect to advice given in construction contract, or that the contract is with respect to construction of a dwelling house for a natural person, then this court will interfere if the sdjudicator got it wrong. It is a case where the sdjudicator has no jurisdiction to begin with. So too if the construction contract is carried out wholly outside Malaysia. (Emphasis added.)

[18] That being the case, this court is not bound by the finding of fact of the adjudicator but instead this court is at liberty to consider the evidence with respect to jurisdiction afresh and anew to determine if the adjudicator appointed had jurisdiction.

[19] If an adjudicator does not have jurisdiction then should the adjudicator find that he did have, then this court is duty bound to set aside the adjudication decision delivered as emanating from an adjudicator that had no jurisdiction to adjudicate the dispute.

[20] The rationale is that when an issue of jurisdiction is raised before an adjudicator, he need not decide on it but may proceed under s 27(3) of the CIPAA as follows:

(3) *Notwithstanding a jurisdictional challenge*, *the adjudicator may in his discretion proceed and complete the adjudication proceedings* without prejudice to the rights of any party to *apply to set aside the adjudication decision under section 15* or to oppose the application to enforce the adjudication decision under subsection 28(1). (Emphasis added.)

[21] The adjudicator may want to make a non-binding finding with respect to his own jurisdiction if he is minded to and give his reasons for arriving at such a finding, but his finding is not binding on the court and the matter when it should come before the court under s 15(d) of the CIPAA, the court is at liberty to consider the jurisdictional challenge afresh and decide accordingly on the critical issue of the core jurisdiction of the adjudicator.

[22] The Federal Court case of *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 referred to the High Court case of *Terminal Perintis Sdn Bhd*, and held as follows:

[16] The term 'jurisdiction' under the CIPAA is not used in the administrative or public law sense but in relation to matters within the scope of the CIPAA. On this point, in *Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and*

another case [2017] MLJU 242 Lee Swee Seng J observed as follows (at para [70]):

> In the application of our CIPAA, we are free from the shackles of the language of administrative law and judicial review. The word 'jurisdiction' is used in s 15(d) as in the adjudicator *having acted in 'excess of his jurisdiction' as a ground for setting aside an adjudication decision.* It is also used in s 27(1) with respect to an adjudicator's jurisdiction being *limited to the matters raised in the payment claim and the payment response.* Then there is a reference to it in s 27(2) with respect to *extending his jurisdiction* by way of agreement in writing to deal with matters not specifically raised in the payment claim and payment response ... (Emphasis added.)

[23] After all s 15(d) of the CIPAA allows the High Court to set aside an adjudication decision on ground that the adjudicator exceeded his jurisdiction. I appreciate that in such an instance the word 'jurisdiction' is used more to refer to a case of contingent jurisdiction and competence jurisdiction in that ordinarily the adjudicator would have jurisdiction but that he exceeded his jurisdiction in adjudicating the dispute when certain contingent requirements with respect to jurisdiction were not met. Thus it can be a case where the payment claim does not state that the payment claim was one made under the CIPAA as required under s 5(2)(d) of the CIPAA or that the payment claim was not properly served as required under s 5(1) of the CIPAA.

[24] The High Court is not powerless to set aside an adjudication decision where there is a complete lack of jurisdiction on the part of the adjudicator to begin with. In *View Esteem* (FC) at para 18 the Federal Court observed that: 'It is what is termed as an absolute lack of jurisdiction that may be taken up at any time'.

[25] As this application by Bina Puri was also made under O 92 r 4 of the Rules of Court 2012, this court may proceed to hear the application to set aside the adjudication decision on ground of the complete lack of jurisdiction to hear the dispute and deliver the adjudication decision under its inherent powers.

Whether the adjudicator had exceeded his jurisdiction in that the subcontract is a 'joint venture vontract' and not a 'construction contract'

[26] To be clear there are joint venture contracts with respect to 'construction works' but that does not make the contract a 'construction contract' within the definition of the CIPAA. One may be tempted to say that it is a case of a 'joint venture construction contract' which would qualify for adjudication under the CIPAA. On the other hand it may also be argued that if a contract is a 'construction joint venture contract' in that the contract may be more a 'joint venture contract' at the core of it which has as its subject matter 'construction work'.

[27] Learned counsel for Bina Puri referred to this court's decision in *YTK Engineering Services Sdn Bhd v Towards Green Sdn Bhd and other applications* [2017] MLJU 632; [2017] 1 LNS 601 where it was held that claims under a joint venture contract do not fall under the CIPAA as follows:

> [33] There is a very real sense in which *the joint venture element overwhelms the true nature and colour of the contract between the two parties*. Whilst it is true that it is in relation to construction works, that by itself, does not make it a construction contract for the purpose of adjudication, but rather *it maintains its essential distinguishing element of being a joint venture contract which has the element of construction works*. (Emphasis added.)

[28] Looking at the long title of the CIPAA, it can be fairly said that the Act was enacted to address the mischief of contractors not being paid by the employer for 'construction work' done under a 'construction contract'. It is not designed for joint venturers who are more of partners in a project which may well be with respect to 'construction work' but that does not make the contract a 'construction contract' within the meaning of s 4 of the CIPAA.

[29] So a 'joint venture construction contract' is more correctly called 'construction joint venture contract' which does not come under the application of the CIPAA though it might have as its subject matter 'construction work'. The adjective closest to the word 'contract' would be the adjective that best qualify the 'contract'. For the purposes of the CIPAA, such a contract is characteristically a 'joint venture' contract which involves 'construction work' and not particularly a 'construction contract' with the element of 'profit-sharing' or 'joint venture.'

[30] The rationale is that 'joint venturers' and 'partners' are able to contractually enforce their rights under the normal procedure in court and, if need be, to even proceed with summary judgment if there are no triable issues. They are not contractors or subcontractors who, having done the 'construction work' is out-of-pocket and still not paid for work done. They need to avail themselves of and activate the provisions of the CIPAA for a quick and speedy mechanism to resolve with interim finality the non-payment issue so that they may have the financial resources to complete the construction contract.

[31] Learned counsel for Bina Puri had highlighted the key clauses in the Recital as indicia pointing inextricably to the fact that the subcontract is in reality a 'joint venture contract' and as such it falls outside the application of the CIPAA. It was submitted that under Recital B of the subcontract, TKL was part of the team that had tendered for the main contract works, having assisted Bina Puri to tender for the M&E works.

[32] Under Recital C of the subcontract, it states that 'TKL shall perform and complete the project, for the whole of the M&E services work portion ...' and '... shall exercise and/or perform all duties, right, remedies and obligations *on behalf of [Bina Puri] under the Main Contract with the Employer ... as if TKL is the party named in the Main Contract;*'. (Emphasis added.)

[33] Further it was stressed by learned counsel for Bina Puri that pursuant to cl 10.1 of the subcontract, it expressly provides TKL a free hand in its M&E works wherein:

(a) Bina Puri shall not in any way interfere with TKL or has any conflict with any decision made by TKL in the execution, implementation, completion, performance and maintenance of the works, unless so provided under the agreement; and

(b) further, all correspondence, liaison and meetings with PRPC in relation to the works and its personnel or authorized representatives and if necessary, with other relevant authorities shall be attended by TKL with the participation of Bina Puri at its discretion; and TKL is further authorised to act on any matters with respect of the Works in the name of Bina Puri.

[34] It was further emphasized by learned counsel for Bina Puri that where payment obligation is concerned it is directly with PRPC and that Bina Puri was merely obligated to render assistance to procure the release of payments from PRPC.

[35] Learned counsel for Bina Puri also referred to the case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor* [1995] MLJU 306; [1995] 3 CLJ 520 which explained that 'it is cardinal rule in the interpretation of contracts that recitals may be taken into account as an aid to construction and this is all the more so where there is ambiguity in the document. Further, in an appropriate case the Court may construe a recital as carrying with it an obligation to carry into effect that which is recited'.

[36] The jurisdictional challenge was first raised in the adjudication proceedings and dismissed by the adjudicator in his decision. All the above concerns of Bina Puri had been addressed and answered by the adjudicator in his adjudication decision as follows:

> 110. I will deal firstly with this jurisdictional issue as part of my explanation as to why I have decided to proceed to determine the merits of this adjudication.
>
> ...

114. Recitals B and C however do not necessarily suggest a joint venture type of arrangement. It could also be construed as a 100% back to back subcontracting arrangement for a portion of the Main Contract Works.

115. It is a well-known fact in the Malaysian construction industry that there are indeed 100% back to back contracting where under a sub-contract, a sub-contractor assumes a main contractor's obligations under a main contract and the main contractor takes a margin as profit from the main contract sum and passes the rest through the sub-contractor ...

116. In these cases, whilst there may be an underlying intention for a joint venture type of arrangement, the contracting structure is usually referred and set-up to be akin to a sub-contract in order to prevent the need for a disclosure at the main contract level of the existence of a joint venture or partner as a main contractor ... Hence, *based on a literal construction taken from the form and substance evinced on the contracting document, it will have to be construed as a sub-contract and not a joint venture.*

...

119. I do accept that just because the Agreement is referred to as 'sub-contract agreement', it does not necessarily mean that it is a sub-contract from the Respondent to the Claimant. *In fact, a harmonious interpretation of all the terms of the Agreement as a whole leads to a reasonable construction that the contractual relationship is the nature of a 100% back to back sub-contract of the entire M&E Works under the Main Contract* where the Respondent takes a margin of the Main Contract Sum allocated for the M&E Works and the balance is paid on to the Claimant once PRPC pays the Respondent.

121. Most telling is Clause 5.1 of the Agreement which clearly spells out that in consideration of the Claimant assisting the Respondent during the tender ... and in consideration of the Claimant agreeing to performing the Respondent's obligations under the Main Contract ..., *the Respondent 'sub-contracts" the entire M&E Works under the Main Contract to the Claimant for the 'Sub-Contract Sum'.*

122. This sets out clearly the intended portrayal of the form and substance of the contractual relationship between the Respondent and Claimant as being a sub-contract. *It is in the form of a 'sub-contract' for the M&E Works on the basis of a 100% back to back arrangement* ... The parties would necessarily understand the difference between 'joint venture' and 'sub-contract' and have chosen to portray their relationship as a sub-contract.

123. *The Agreement also contains in Clause 29.1 an express term that prevents any construction of the contractual relationship between the Respondent and the Claimant as being akin to a joint venture.*

124. I also find that the provision for the Respondent to take a margin of the Main Contract Sum for the M&E Works as set out in Clause 7.1(a) and a margin over variations related to these M&E Works as set out in Clause 7.4 ..., irresistibly infers a relationship of sub-contracting rather than a joint venture type joint venture partner over another joint venture partner's carved out scope of works.

125. The Respondent's assertions in regards to the Claimant jointly financing the Project with the Respondent again is not uncommon for a 100% back to back sub-contracting of a large portion of the Main Contract Works.

...

127. The Respondent has admitted that it never revealed any purported joint venture with the Claimant to PRPC or OUIJV under the Main Contract. Clause 8.4 of the Main Contract is clearly intended for all joint venture parties to be disclosed and exposed to a privity of contract with PRPC so that all parties may be jointly and severally liable to PRPC ... *It is however my view that the Respondent's assertion presently that the contractual relationship it has with the Claimant is akin to joint venture is an afterthought.*

128. Further, *there is also no satisfactory explanation given by the Respondent as to why the Respondent was in fact issuing Payment Certificates termed as 'Sub-Contractor Interim Valuation Certificates' to the Claimant* where the Respondent certifies the values of works payable to the Claimant. This action by the Respondent in fact corroborates the existence of a sub-contract rather than a joint venture contractual arrangement between the Respondent and the Claimant ...

129. *I accordingly find and hold that the contractual relationship between the Respondent and the Claimant is in fact a sub-contract for the entire M&E Works under the Main Contract on a 100% back to back basis*. The Agreement is a sub-contract for construction works namely M&E Works under the Main Contract and it therefore falls within the jurisdiction of CIPAA 2012. (Emphasis added.)

[37] See pp 288–292 at exh 'P11' of the enforcement affidavit No 1, I find the above analysis impeccable and there is no good reason for me to interfere with such a finding of facts relevant to the determination of the issue of core jurisdiction.

[38] This court would have come to the same conclusion even if the adjudicator had not given any reason for his proceeding as if he has jurisdiction which is what is permitted under s 27(3) of the CIPAA. The reasons given by the adjudicator are both cogent and compelling and this court is constrained to uphold such a finding on jurisdiction, having being convinced independently that indeed the contract in question is a 'construction contract' and not a 'joint venture contract'.

[39] The contract in question is a typical subcontract quite common in the construction industry in Malaysia with all the work at the ground level being done by the subcontractor and the main contractor would take a margin and pass the contractually agreed subcontract sum to the subcontractor and with that the risk as well.

[40] The fact that the margin taken by Bina Puri can be easily ascertained being the difference between the main contract sum and the subcontract sum does not transform the subcontract for construction work into a 'joint venture contract'.

[41] The fact that there is a profit margin given upfront to Bina Puri does not convert the contract into a 'joint venture contract' for no commercial entity would enter into a subcontract with its subcontractor without calculating beforehand the profit margin whether by way of providing for it by percentage or amount.

[42] TKL further submitted that the subcontract is not called a joint venture agreement, and nothing in the subcontract suggests that there is an intention for a joint venture between parties. Had the parties' intention been to enter into a joint venture contract, each parties' obligations and rights and entitlements to profits as well as the common goal would have been clearly set out.

[43] On the contrary and clearly the subcontract instead expressly identifies itself as a subcontracting agreement and states in its terms that it is subcontracting a portion of the works in the main contract. I agree with learned counsel for TKL that to interpret the subcontract as a joint venture agreement would be to go against the express terms of the agreement and would reinvent the agreement into something it is not.

[44] There is merit in TKL's submission that a reading of the subcontract would show that it is patently *not* a joint venture agreement:

(a) cl 10.2 of the subcontract states that 'none of the provisions of this Agreement shall constitute any agency between the parties' hereto; and

(b) cl 29.1 of the subcontract states that 'Nothing in this Agreement shall be deemed to constitute partnership between the Parties hereto nor constitute any part the agent of the other part or parties to this Agreement for any purpose whatsoever'

[45] The above clauses and conduct are not only incompatible with any joint venture, but refer irresistibly to the fact that the contract is a typical back-to-back 100% subcontracting agreement.

[46] My attention was also drawn to the fact that in relation to Bina Puri's payment obligations under the subcontract agreement, the adjudicator had made the following pertinent findings:

131. The Respondent asserts that the payment obligation is directly with PRPC and the Respondent is merely a conduit. Yet at the same time the Respondent accepts that there is no privity of contract between the Claimant and PRPC. These 2 assertions draw out an essential contradiction. *If there is no privity of contract between PRPC and the Claimant, there is no obligation on the part of PRPC to pay the Claimant. Hence the obligation can only therefore be with the Respondent.* Otherwise, there will be no party at all contractually obliged to pay the Claimant.

134. It is to be noted that even in situations when the Claimant had requested for direct payments from PRPC ... and the Respondent had procured such direct payments from PRPC, the Respondent had to issue tax invoices to PRPC for these payments. There is no doubt that under the Main Contract, PRPC's obligations was to only pay the Respondent since the Claimant was never disclosed or held out as a joint venture or consortium member of the Respondent as the Package Contractor under the Main Contract. *When PRPC had agreed to pay directly, it did not create any new privities of contract between PRPC and the Claimant.*

...

136. I accordingly find and hold that the payment obligation in Clause 9.1 under the Agreement is a conditional payment on the part of the Respondent ...

137. ... *I therefore find and hold that pursuant to s 36 Of CIPAA 2012, the Respondent is obliged to pay the Claimant* within 30 days of receipt of the invoice which necessarily has to be construed as 30 days upon receipt of the Claimant's progress claim. (Emphasis added.)

[47] As found by the adjudicator, during the course of the subcontract, payments from Bina Puri to TKL were made via cheques from Bina Puri, evincing that Bina Puri was the paymaster under the subcontract. In fact, TKL's progress claims were submitted to Bina Puri, not the employer, and this was done without complaint from Bina Puri. Correspondingly, Bina Puri issued out certificates in favour of TKL and paid via its own cheques.

[48] Learned counsel for Bina Puri drew the court's attention to cl 12.1 of the subcontract which placed an obligation on the claimant TKL to arrange for financing for the whole 'project' and to bear all costs and expenses of the 'project'.

[49] The 'project' by definition, it was pointed out, was the whole 'project' from PRPC of which the component that is given to the claimant to work on is referred to as 'the works'.

[50] However if that is the case, it does not make any economic and commercial sense, let alone common sense, because the whole project sum is about RM248m and that the gross sum that the claimant would receive for the works was just a mere RM58m.

[51] More likely than not, this is a case of loose drafting where parties have mistakenly referred to 'project' when they had meant 'the works'. **A**

[52] At any rate to show a joint venture that parties had agreed, Bina Puri must show some evidence in the performance and payment with respect to the Works where one can see some joint venture element. **B**

[53] Here there is no evidence of that at all and more importantly all the other clauses referred to are quite consistent with a subcontract that is in the nature of a 100% subcontracting where the claimant TKL as subcontractor does everything with no interference from Bina Puri and also a clear indemnity clause from the claimant TKL to Bina Puri. **C**

[54] The critical thing is that the claimant is to be paid a fixed sum as agreed contract sum barring any variation works and under cl 7.1 Bina Puri is entitled to keep their portion from the amount that they would be receiving from PRPC. This is unremarkable as in all subcontracting works. **D**

[55] The fact that at the end of the day every piece of work and follow up on payment and billing is done by the claimant TKL is also unremarkable for such a 100% subcontracting work. **E**

[56] The facts remain that PRPC paid Bina Puri and Bina Puri in turn paid the claimant TKL the contractually agreed sum. Bina Puri even certified payments due to the claimant in making payment to the claimant. **F**

[57] I found that the adjudicator clearly had jurisdiction to adjudicate the claim and deliver the decision, the contract in question being a 'construction contract' within the meaning of s 4 of the CIPAA to which under s 2 the CIPAA applies. **G**

[58] There is no element of joint venture that would transform or cause the 'construction contract' to evolve into a 'joint venture contract' that takes it outside the applicability of the CIPAA. **H**

Whether the adjudication decision ought to be set aside on ground that the adjudicator had failed to appreciate the breaches and delay on the part of the claimant **I**

[59] Bina Puri's setting aside affidavit No 1 also raised various averments on the background facts and merits of the disputes between the parties, such as Bina Puri's 'stepping-in' to take over carry out TKL's M&E works; see: paras 9,

10 and 17.1 of the setting aside affidavit No 1 and that Bina Puri had issued letters to TKL on TKL's alleged delay of the works; see: paras 11 of the setting aside affidavit No 1.

[60] These are findings of facts and it is not proper nor within the purview of this court to review the decision made on ground of wrong factual findings or insufficient appreciation of certain evidence adduced. This after all is not an appeal. In *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd* [2015] MLJU 941; [2015] 8 CLJ 728 the High Court had stated that in considering applications to set aside adjudication decisions:

> [10] *It must be noted that under the CIPAA, there is no right of appeal against the decision of the adjudicator which is interim in nature or of temporary finality only.* Section 15 has provided limited grounds on which the decision of the adjudicator may be set aside. *Since an application under s 15 is not an appeal, the decision of the adjudicator cannot be reviewed on merits.* In the instant case, the applicant has relied on the ground of breach of natural justice and excess of jurisdiction to set aside the decision of the adjudicator. In the premises, *the criticism of the adjudication decision by the applicant must clearly point to a breach of natural justice or a jurisdictional error in the adjudication process. Otherwise, the instant proceeding would be converted to a full blown appeal or a rehearing of the adjudication process.*
>
> ...
>
> [14] ... As I said earlier, *s 15 does not envisage that the decision of the adjudication can be reviewed on its merits. Therefore, it is immaterial if the adjudicator had erred in his finding of facts.* The decision of an adjudicator is only of temporary finality pending final settlement of accounts. *In the premises, unless that there is a clear cut breach of natural justice or excess of jurisdiction, the court should be slow to set aside the decision of the adjudicator.* ... (Emphasis added.)

[61] It was further highlighted by TKL that in any event, Bina Puri's allegation of delays on the part of TKL and its purported step-in rights under the subcontract agreement had been taken into account and considered by the adjudicator. In fact, in the adjudication decision, the adjudicator had allowed a set off of RM8,363,908.77 in favour of Bina Puri against TKL.

[62] This is a case where Bina Puri is estopped from contending on the merits of the adjudication proceedings which had already been dealt with in the adjudication proceedings.

PRONOUNCEMENT

[63] Overall whatever may be argued with respect to the total subcontracting feature of this subcontract, it still remains for all intents and purposes a subcontract which is still a 'construction contract' in writing and it has not in any way evolved into or transformed itself into a 'joint venture contract' or

something akin to it such as to take it out from the application of adjudication under the CIPAA which generally applies to all 'construction contracts'. Therefore I was constrained to dismiss Bina Puri's setting aside application and correspondingly and consequently to allow TKL's enforcement application.

[64] As for cost after hearing parties and as suggested by learned counsel for TKL, I allowed the claimant costs of RM6,000 for each of the originating summons.

Application allowed with costs of RM6,000 for each of originating summons.

Reported by Mohd Kamarul Anwar